INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Specification of errors to be urged	6
Reasons for granting the writ	6
Conclusion	7

CITATIONS

Cases:	
Fidelity-Philadelphia Trust Co. v. *Rothensies*, 142 F. 2d 838	6
Schultz v. *United States*, 140 F. 2d 945	6
Statute:	
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 302, as amended	8
Miscellaneous:	
Treasury Regulations 80 (1937 ed.):	
Art. 17, as amended	9

612307—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in this case, reversing the decision of the Tax Court of the United States.

OPINIONS BELOW

The opinion of the Tax Court (R. 25–30) is reported in 2 T. C. 21. The opinion of the circuit court of appeals (R. 41–43) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on August 1, 1944 (R. 43). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the full value of property transferred in trust by the decedent should be included in his gross estate under Section 302 (c) of the Revenue Act of 1926, as amended, as held by the Tax Court, or whether that value should be reduced so as to include only the value of a remainder payable at all events upon the death of the survivor of two of decedent's nieces, as held by the circuit court of appeals.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 8–11.

STATEMENT

The Tax Court found the following facts (R. 25–28):

Decedent died on November 16, 1937, at the age of 52. On June 8, 1922, he transferred to Bankers Trust Company, as trustee, certain assets valued at the date of his death at the sum of $307,452.82, which value was included by the Commissioner in decedent's estate in computing the present deficiency. (R. 25–26.)

Summarized, the terms of this trust are (R. 26–27):

> A. The trust is to continue for the joint lives of two nieces and the life of the sur-

vivor of them unless terminated earlier under F, *infra*.

B. The income is to be paid to decedent for his life unless the trust terminates before his death.

C. Upon the death of decedent prior to the termination of the trust leaving issue or a widow, $150,000 is to be placed in trust for the widow and the balance, or, if he left no widow, all, is to be held in trust for his children, the issue of any deceased child to take the share of such deceased child. Separate, equal trusts are to be set up for each.

D. The aforesaid trusts are subject to decedent's right to reduce or cancel the amounts of the gifts by will or instrument in writing and the amounts by which any gifts are reduced or canceled are to be added to the gifts for the issue which are not reduced (no restoration being permitted of any gift reduced).

E. If the decedent cancels all of the gifts or reduces gifts so that there remains a balance undisposed of, then all of the balance undisposed of is to go to his brother or sister surviving or their issue.

F. During the continuance of the trusts the income is to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus is to be paid to the beneficiary's issue surviving, but if there be none, to the issue of the decedent surviving, if none,

then to decedent's brother or sister or their issue.

G. Upon the death of the widow, the corpus of the trust created for her benefit is to go the issue of decedent surviving, but if none, then to the brother or sister or their issue.

H. Upon termination of the trust before the death of the decedent the corpus is to be paid over to decedent.

I. Upon termination of the trust after the death of decedent but during the existence of any trust the corpus is to be paid to the life beneficiary.

The decedent at no time had any issue. At the time of his death, decedent was survived by his two nieces whose lives were to measure the maximum life of the trust, and they were then 18 and 25 years old, respectively. He was also survived by his widow, Blanche Field, by his sister. Ruth Rosenfield Hollander, and by John R. Field and Warren R. Field, issue of a deceased brother, Hugo Rosenfield. (R. 27.)

It is conceded by the taxpayer that the value of the corpus of the trust to the extent of $150,000, directed to be set aside for the decedent's widow, was properly includible in decedent's gross estate at his death, since decedent, to the extent of that value, retained until his demise the power to change the disposition of the widow's fund in that maximum amount by reducing or canceling

it in its entirety. The value of a remainder in the sum of $157,452.82, payable at all events upon the death of the survivor of two females, aged 18 and 25 years, respectively, was, at the time of decedent's death, $24,930.76. The value at the date of decedent's death to a man aged 52 years of the right to receive a remainder in the sum of $157,452.82, payable upon the death of the survivor of two females, aged 18 and 25, respectively, contingent upon his survival of both of such females, was $891.18. (R. 27–28.)

The Tax Court held that the full amount of $157,452.82 was includible in the gross estate, but the court below reversed and remanded the case to the Tax Court with directions to include only $24,930.76 thereof. In so holding, the court said (R. 43):

> Accordingly we hold that the value of the transfer at decedent's death consisted of the value of the trust property minus the value of the life estates of his two nieces.

But the two nieces did not have life estates, although their lives did measure the duration of the trusts. It must be assumed, therefore, that what the court meant was that the gift of the $157,452.82 must be reduced by discounting the value of the property for the period of the life expectancy of the survivor of the two nieces. In this way, the value of interests which might conceivably intervene between the death of the decedent and the

payment of the corpus would be excluded from the gross estate.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that there should be included in the gross estate under Section 302 (c) of the Revenue Act of 1926, as amended, on account of the transfer in trust here involved, only the value of a remainder payable in all events upon the death of the survivor of the decedent's two nieces.

(2) In not holding that the entire sum of $157,452.82 was properly includible as held by the Tax Court.

(3) In reversing the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

The decision of the court below is in direct conflict with *Fidelity-Philadelphia Trust Co.* v. *Rothensies,* 142 F. 2d 838 (C. C. A. 3d), petition for certiorari filed July 17, 1944, No. 263, this Term; and *Schultz* v. *United States,* 140 F. 2d 945 (C. C. A. 8th.) In both the *Fidelity-Philadelphia* and *Schultz* cases it was held that the full value of transferred property should be included in the gross estate under circumstances comparable to those here presented. In our memorandum filed in response to the petition for certiorari in the *Fidelity-Philadelphia Trust Co.* case, we admitted (p. 11) that there is a conflict with respect to the valuation question. Reference is here made to

that memorandum which sets forth our views in detail. The question is of importance in the administration of the estate tax.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

OCTOBER 1944.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by the Act of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature

of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.[1]

Treasury Regulations 80 (1937 ed.):

ART. 17 [as amended by T. D. 5008, 1940–2 Cum. Bull. 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or

[1] The italicized portion represents the amendment made by the Act of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932.

a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the value of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV–2, 339 (1935)]) and

Becker v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV–2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940–1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X–1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

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